

September 18, 2009

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E0401064**

**FRANK ZELLERHOFF, SR., FRANK ZELLERHOFF, JR. AND
ZELLERHOFF CONSTRUCTION, INC.**
Code Enforcement Appeal

Location: 12726 SW Cemetery Road, Vashon Island

Appellants: **Frank Zellerhoff, Sr., Frank Zellerhoff Jr. and Zellerhoff Construction, Inc.**
10120 SW 260th Street
Vashon, Washington 98070
Email: zellerhoff@centurytel.net

King County: Department of Development and Environmental Services (DDES)
represented by Sheryl Lux
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
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SUMMARY OF RECOMMENDATIONS/DECISION:

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| Department's Preliminary Recommendation: | Deny, with revised compliance schedule |
| Department's Final Recommendation: | Deny, with further revised compliance schedule |
| Examiner's Decision: | Deny, with further revised compliance schedule |

EXAMINER PROCEEDINGS:

The hearing originally scheduled for June 14, 2006 was continued on call without being convened, in order to afford the Appellants time to seek a legislative remedy.

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| Hearing opened: | September 3, 2009 |
| Hearing closed: | September 3, 2009 |

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On April 7, 2006, the King County Department of Development and Environmental Services (DDES) issued a code enforcement Notice and Order to the Appellants, finding a violation of county code on the premises of 12726 SW Cemetery Road on unincorporated Vashon Island. The property is zoned Rural Area-5 (RA-5). The Notice and Order cited the Appellants and the property with the following violation of county code:

- A. Operation of a construction business and/or materials processing facility (citing KCC 21A.06.247 and 21A.06.742).

Compliance was required by the Notice and Order to be performed by cessation of the cited business activities on the property and removal of all associated stored materials and vehicles by August 6, 2006.

2. The Appellants filed an appeal of the Notice and Order. The appeal does not contest the basic finding of violation, but notes the longstanding nature of the construction and materials processing operation on the site (since several years prior to 1992), and asserts the unsuitability of the property for residential use. The Appellants requested a stay of enforcement of the Notice and Order to enable the Appellants to pursue a legislative remedy to legitimize the use on the property. An on-call continuance was granted by the Examiner on May 16, 2006 at the mutual request of the parties. The matter later came on for hearing on September 3, 2009.
3. The Appellants' commercial use onsite occupies a structure which was erected under a building permit issued for a "detached barn" stated to be for agricultural purposes and obtained in or around 1991. This structural development occurred prior to Appellants' purchase of the property.
4. Appellant Frank Zellerhoff, Jr. testified that he was not aware that the structure was developed as an agricultural building, and that it was in use as a welding shop when the Appellants purchased the property. The Appellants were unaware of the misleading auspices of the permit obtainment and/or unpermitted conversion of the use of the building. The Appellants thus constitute innocent purchasers of the violating land use situation on the property.
5. Although the Appellants note that the business has been onsite for approximately two decades, no claim is made that there exists a right to operate the construction and materials processing business onsite as a nonconforming use.
6. A remedy cited by the Appellants in their appeal to be pursued for legitimizing the use is a rezone. A curative rezoning of the property has not been obtained. A pertinent legislative amendment to the zoning code was enacted under Ordinance 16028 effective March 20, 2008, amending KCC 21A.08.080 to allow construction business and materials processing in the RA zones under specified conditions. However, if the property size is less than 10 acres, a conditional use permit is required. As the subject property is 5.62 acres in area, a conditional use permit is required for the construction business and materials processing use of the property.

7. The Appellants have been unable to meet prerequisites for a conditional use permit application, particularly onsite sanitation approval from the Health Department with a legal source of water.
8. Obtaining a legal source of water for the property has been problematic. First, drilling an onsite well would not provide a legal source because the property's direct adjacency to a King County solid waste landfill (directly abutting to the north) encumbers it with a regulatory 1,000 foot well prohibition radius from the landfill boundary, which radius encompasses the entirety of the subject property. The possibility of obtaining water via an adjacent property outside of the 1,000 foot radius under a joint-use Class B water system has been pursued but has not proved fruitful. The only other apparent source of water would be service by Water District No. 19, which agency's distribution system is three miles distant and which also has a waiting list of over 100 prospective customers with a minimum five-year wait.
9. The Appellants claimed at hearing, though not in a timely fashion in the statement of appeal, that when the Appellants' business was first located on the property, DDES personnel were aware of its having located onsite.
10. DDES has made a *prima facie* case that a construction business/materials processing use is operated on the property in violation of basic zoning regulations under King County code.
11. At hearing, DDES recommended a three-month compliance period, necessitating removal of the business operation from the property to bring it into compliance.
12. DDES testified that it was not aware of any particular hazards associated with the unpermitted operation.

CONCLUSIONS:

1. The Appellants' untimely assertion that the County was long aware of their business occupancy of the property is an intimation of a claim of tacit acceptance, tantamount to a claim of *equitable estoppel*, i.e., that the County is barred from enforcement because of such tacit acceptance.
2. The *estoppel* issue was not timely raised in the appeal, so it cannot be considered as an actionable appeal claim. The Examiner notes, however, that in any case the Examiner has no authority to grant equitable relief based on assertedly improper or unfair administration of the code enforcement and permit processes. The Examiner is generally limited to applying law duly enacted by statute, ordinance and rule, or set forth in case law, and has no authority to adjudicate common law issues such as claims in equity. Equity claims would instead have to be brought in a court of general jurisdiction, the Superior Court. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 689 P.2d 1084 (1984)]
3. Given the facts found above of the Appellants' innocent purchaser status, they are not subject to penalties for the found violation. As successor property owners, however, they are fully responsible for correcting the violation and bringing the property into code compliance. If compliance is not performed by the property owners, the County is empowered to initiate abatement to achieve such compliance, with the power to assign reasonable abatement costs to the property. [KCC 23.02.130.B]

4. As the construction business/materials processing use was during its tenure onsite first a use completely unpermitted in the RA-5-zoned site, and now required to have a conditional use permit, and no such permit has been obtained, the land use violation stated in the Notice and Order is correct and therefore sustained.
5. The property must be brought into compliance. As noted, DDES has recommended a three-month (90 days) period for correction, which runs into the rainy season and seasonal holiday period and makes a business relocation somewhat problematic. In the absence of any known hazard associated with the land use on the property, a three-month time period is also unreasonably short. (The Examiner also notes that the Notice and Order had established a four-month compliance deadline.)
6. The Examiner finds in these circumstances that a one-year timeframe for relocation is more appropriate. This will provide a reasonable amount of time for the relocation of the business to another suitable property with relocation occurring during a more favorable season and, as importantly, will allow the Appellants some additional time to continue to seek some remedy which may allow the operation to remain onsite. With the caveat that the reader should not take the following recitation as an exhaustive list, remedies may take the form of a rezone, a legislative amendment to the minimum acreage threshold for lifting of the conditional use permit requirement, a variance to the acreage limitation or even an alternative water source.
7. The outlook for any of those alternatives seems somewhat bleak at present, and the parties should be careful to note that the Examiner's recitation of possible alternatives should not be taken by any means as suggesting the possibility of approval of any or all of them. Particularly, the parties should take note that the Examiner makes no prejudicial judgment regarding the likelihood of approval of a variance.

DECISION:

The Notice and Order is sustained, and the appeal DENIED, provided that the COMPLIANCE SCHEDULE is REVISED as stated in the following order.

ORDER:

1. Unless a legal remedy is obtained to allow the subject construction business/materials processing use to remain on the property in conformity with newly applicable regulations and/or some legally effective form of regulatory relief, the operation shall be ceased and the land use and all associated equipment/materials/vehicles/storage, etc., shall be removed in their entirety from the property *by no later than September 20, 2010*.
2. DDES is authorized to grant deadline extensions of the above requirement if warranted, in DDES's sole judgment, by circumstances beyond the Appellants' diligent effort and control.
3. No fines or penalties shall be assessed by DDES against the Appellants and/or the property with respect to the violation cited in the Notice and Order. Correction is still required, however, to bring the property in compliance with the land use regulations of the zoning code. The County is empowered to initiate abatement to achieve compliance if necessary. In such case reasonable abatement costs may be chargeable to the property as provided by county code.

ORDERED September 18, 2009.

Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE SEPTEMBER 3, 2009, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0401064

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Sheryl Lux representing the Department and Frank Zellerhoff, Jr., one of the Appellants.

The following Exhibits were offered and entered into the record:

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| Exhibit No. 1 | Department of Development and Environmental Services (DDES) staff report to the Hearing Examiner for E0401064 |
| Exhibit No. 2 | Copy of the Notice & Order issued April 7, 2006 |
| Exhibit No. 3 | Copy of the Notice and Statement of Appeal received April 21, 2006 |
| Exhibit No. 4 | Copies of codes cited in the Notice & Order |
| Exhibit No. 5 | Copy of amended KCC 21A.08.080 |
| Exhibit No. 6 | 2007 aerial of property from GIS |
| Exhibit No. 7 | Color photographs of property taken by Sheryl Lux on January 26, 2006 |
| Exhibit No. 8 | Aerial of property taken September 3, 1989 |
| Exhibit No. 9 | Aerial of exh. 8 blown up |

PTD:gao
E0401064 RPT